IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

---

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

---

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

---

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; PROPOSED ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT; and BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT



JOSEF D. COOPER
Room 310
United States Courthouse
Honolulu, Hawaii 96810

Attorney for Amicus Curiae,
Honorable Martin Pence.

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

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Nos. 22541 A-G, 22574,
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MOTION FOR LEAVE TO FILE BRIEF AS

AMICUS CURIAE AND

TO APPEAR AND MAKE ORAL ARGUMENT

---

TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

NOW COMES HONORABLE MARTIN PENCE, Chief United States District Judge for the District of Hawaii, sitting by special assignment in the Western District of Washington, District of Oregon, Northern District of California, Central

District of California, and Southern District of California, Movant herein, by his attorney, and MOVES THE COURT

For leave to file the attached Brief as Amicus Curiae In Opposition To Brief Of Applicant American Pipe and Construction Co., and to appear and make oral argument. Pursuant to Rule 18(9)(b) of this court, Movant relies upon the following facts and reasons in support of his motion:

Each of the above-captioned actions seeks review of a pre-trial order entered in civil, treble-damage antitrust actions now pending before Movant below. Such actions have been assigned to Movant for over three years just past, during which period pre-trial proceedings have been conducted according to identical pre-trial orders designed to prepare all of over 100 actions for trial. The pre-trial proceedings conducted to date include discovery proceedings under Rules 26, 33, and 34, Fed. R. Civ. Pro., the preparation and exchange of detailed trial briefs setting forth all facts and legal authority on which each party intends to rely or introduce into evidence at trial, and identification of and rulings on questions of law, where possible. In addition Pre-Trial Order No. 15 (dated February 26, 1968), which supersedes Pre-Trial Order No. 14 from which American Pipe and Construction Co. has taken this application, requires

that the parties, among other things, (a) designate all deposition testimony and documentary evidence they intend to introduce at trial, (b) produce all polls, samples, summaries, surveys, and computer runs, including all raw data and work sheets and an explanatory statement they intend to introduce at trial, and (c) file requests for admissions of facts and of genuineness of documents, witness lists, suggested voir dire questions, suggested instructions and suggested special interrogatories to the jury. Applicant challenges that provision of Pre-Trial Order No. 14 which sets three or more of the actions below for separate trial. Such a provision was first suggested in a letter from Movant to lead counsel for all parties dated November 28, 1966. (Appendix to Movant's Brief In Opposition To Brief Of Applicant at page 11.) It was first formalized as paragraph 7Q, Pre-Trial Order No. 9 (dated February 21, 1967), and has been repeated in substance in three (3) subsequent orders (Pre-Trial Order No. 12, paragraph 5P, dated October 11, 1967; Pre-Trial Order No. 14, paragraph 5S, dated November 27, 1967; and Pre-Trial Order No. 15, paragraph 26, dated February 26, 1968). (Pre-Trial Orders Nos. 9, 12, 14, and 15 are attached to Movant's Brief In Opposition To Brief Of Applicant at pages 12-50.) Movant's trial calendar may be directly affected by the outcome of these proceedings.

On December 1, 1967 this Court of Appeals denied applicant's motion for leave to file petition for writ of mandamus in American Pipe and Construction Co. vs. HONORABLE MARTIN PENCE, Chief Judge of the United States District Court for the District of Hawaii, No. 22336. That proceeding involved the same substantive issues as are presented herein. On January 9, 1968 this Court of Appeals further denied applicant's application for reconsideration of motion for leave to file petition for writ of mandamus and request for hearing en banc in Court of Appeals Number 22336.

On February 5, 1968 this Court of Appeals ordered "that this proceeding shall be considered in the nature of mandamus."

Writs of mandamus are commands which require performance by the party (Movant herein) to whom the command, if granted, would be directed. Movant may be an indispensable party to these proceedings, without whom they cannot continue. See Hospoder v. United States, 209 F.2d 427 (3 Cir. 1953). Any order of this Court of Appeals granting applicant's requested relief would be directed to Movant, and would specifically affect Movant's trial settings in the pending actions below. Yet, Movant is not now a party to the instant proceedings, taken originally in the form of an appeal, and

his interests are not represented before this court.

The sole question presented by these proceedings is the authority of the district judge to set ready actions for trial. Applicant's complaint is directed toward an order initiated by Movant below, and does not require determination of rights between the parties to the litigation. Movant is the real party in interest, and should be allowed to file an answer and contest applicant's position. Speer v. Rural Special School Dist. No. 50 of Norphlet, Union County, Ark. 100 F.2d 202 (8 Cir. 1938); Davis, et al. v. Board of School Commissioners of Mobile County, Alabama, 318 F.2d 63 (5 Cir. 1963); Rapp v. Van Dusen, 350 F.2d 806 (3 Cir. 1965).

Movant has secured written consent to file his brief from all parties to this proceeding, copies of which are attached hereto as Appendices A, B, and C. Accordingly, it would appear that Movant is entitled, of right, to file his brief under Rule 18(9)(a) of this Court of Appeals. However, considering the unusual nature and posture of this proceeding, Movant does no more than request the Court's permission to file and be heard.

Movant is represented in these proceedings by JOSEF D. COOPER, Esq. Mr. Cooper was admitted to practice before this Court of Appeals on March 23, 1967, and has also

been admitted to practice before all the courts of the States of Hawaii and Illinois, and the United States District Courts for the District of Hawaii and the Northern District of Illinois. Mr. Cooper has been employed by Movant as his special administrative assistant for the actions below since July 18, 1966, and has full knowledge of all proceedings therein.

DATED: February 28, 1968.

Respectfully submitted,

JOSEF D. COOPER

Josef D. Cooper

Attorney for Movant,
Honorable Martin Pence.

AMERICAN PIPE AND CONSTRUCTION CO.
CORPORATE HEADQUARTERS: 400 SOUTH ATLANTIC BOULEVARD, MONTEREY PARK, CALIFORNIA 91754

PLEASE REPLY TO:
110 LAUREL STREET
SAN DIEGO, CALIFORNIA 92101
(714) 233-6337

February 24, 1968

Hon. Martin Pence, Chief Judge
United States District Court
District of Hawaii
U. S. Courthouse and Post Office
Honolulu, Hawaii

Re: American Pipe and Construction Co. v. The State of California, et al
U. S. Court of Appeals, Ninth Circuit
Nos. 22541 A-G, 22574, 22575, 22576 A-L,
22577 A, 22578 A-C.

Dear Judge Pence:

Pursuant to your request, I am happy to consent on behalf of appellant American Pipe and Construction Co. to the filing of a brief amicus curiae by you in the above captioned matter. This consent is pursuant to the provisions of Rule 18.-9.(a).

Respectfully yours,

George W. Jansen

GEORGE W. JANSEN

GWJ:mmj

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
TO APPEAR AND MAKE ORAL ARGUMENT

GUSON
. BURDELL
LHOEFT
L. DAVIDSON
LPERT, JR.
MANNING
GREENAN
JR.
MOORE
DOUPE
HEPPARD

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929 LOGAN BUILDING
Seattle, Washington 98101
MAIN 2-1711

February 26, 1968

Honorable Martin Pence
Chief Judge
United States District Court
P.O. Box 19
Honolulu, Hawaii 96810

Dear Judge Pence:

Please be advised that the Compact Plaintiffs consent to your filing an amicus curiae brief in accordance with Rule 18(9)(a) of Rules of the United States Courts of Appeals.

Very truly yours,

FERGUSON & BURDELL

Wm H Ferguson

By: Wm. H. Ferguson
Lead Counsel

WHF:sl

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
TO APPEAR AND MAKE ORAL ARGUMENT

APPENDIX B

OUGHTON
UCK
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OMARK

HOUGHTON, CLUCK, COUGHLIN, SCHUBAT & RILEY
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SEATTLE, WASHINGTON 98104

TELEPHONE
MAIN 3-6501

February 26, 1968

Hon. Martin Pence
Judge of the United States
District Court for the
State of Hawaii
P. O. Box 19
Honolulu, Hawaii 96810

Re: Nos. 22541 A-G, 22574, 22575, 22576 A-L
22577 A, 22578 A-C
In the United States Court of Appeals
for the Ninth Circuit
American Pipe and Construction Co., Appellant
vs.
The State of California, et al., Appellees

Dear Judge Pence:

Please be advised that we consent to the filing of a brief as amicus curiae in the captioned matter pursuant to the provision of Rule 18(9)(a) of the Rules of the United States Court of Appeals for the Ninth Circuit.

Very truly yours,

HOUGHTON, CLUCK, COUGHLIN,
SCHUBAT & RILEY

By John W. Riley
John W. Riley
Attorneys for Washington Public
Power Supply System, Appellee
Civil Cause No. 6568
United States District
Court for the Western
District of Washington

JWR:jlt
cc: Ferguson & Burdell
George W. Jansen, Esq.

MOTION FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE AND
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IN THE UNITED STATES COURT OF APPEALS

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v.

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ORDER GRANTING LEAVE TO MOVANT TO FILE BRIEF
AS AMICUS CURIAE AND TO APPEAR AND MAKE ORAL ARGUMENT

IT IS HEREBY ORDERED that the Motion of Honorable Martin Pence to file a brief as amicus curiae in the above-captioned actions, and to appear and make oral argument is GRANTED.

DATED: March _____, 1968:

_____

_____

_____

United States Circuit Judges

IN THE UNITED STATES COURT OF APPEALS

For the Ninth Circuit

---

Nos. 22541 A-G, 22574,
22575, 22576 A-L,
22577A, 22578 A-C

---

American Pipe and Construction Co., Appellant

v.

The State of California, et al., Appellees

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On Appeal From the United States District Courts for The: Western District of Washington, District of Oregon, Northern District of California, Central District of California, and Southern District of California.

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# BRIEF OF AMICUS CURIAE IN OPPOSITION TO BRIEF OF APPLICANT

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JOSEF D. COOPER
Room 310
United States Courthouse
Honolulu, Hawaii 96813

Attorney for Amicus Curiae,
Honorable Martin Pence

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

IN THE UNITED STATES COURT OF APPEALS

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v.

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---

BRIEF OF AMICUS CURIAE IN OPPOSITION

TO BRIEF OF APPLICANT

---

JURISDICTION

On December 26, 1967 applicant American Pipe and Construction Co. initiated the instant proceedings by filing notices of appeal in twenty-seven (27) civil anti-trust actions now pending in the district courts. Such actions were filed by over three hundred (300) plaintiffs

who claim injury allegedly resulting from overcharges on approximately 2200 purchases of pipe from applicant. All of these actions have been assigned to Judge Martin Pence, Chief Judge, United States District Court for the District of Hawaii (the amicus curiae herein), sitting by designation of the Chief Judge of this Appellate Court pursuant to Title 28, U.S.C. § 292(b) in the various districts where such actions are pending. The specific civil actions were assigned to Judge Pence by the Chief Judge of each district subsequent to Judge Pence's designation to hold court in such district. (Copies of the designations assigning Judge Pence to each district, and sample orders assigning the specific cases to Judge Pence, are attached hereto as Appendix pages 1-10.)

Judge Pence conducted his first pre-trial conference in these actions on March 11-12, 1965. Since that time Judge Pence has conducted pre-trial hearings almost monthly, and has entered fifteen (15) pre-trial orders scheduling pre-trial proceedings in all actions. Although identical pre-trial orders have applied to all actions, and the parties have generally performed the ordered acts on a common, joint, or co-operative basis, no order has ever been entered consolidating these actions for any purpose. To the contrary, Judge Pence's pre-trial orders have specifically provided

that each order be entered and apply severally to each pending action.

Applicant is contesting paragraph 5S of Judge Pence's Pre-Trial Order No. 14, dated November 27, 1967, which schedules three or more of the instant actions for separate trial. The possibility of such a provision was first suggested by Judge Pence in his letter to counsel dated November 28, 1966, as follows:

> ". . . The possible revision /of an anticipated pre-trial order/ that I am considering is that of scheduling all discovery in all cases to be carried on simultaneously and then holding practically simultaneous trials in Seattle--with Judge Boldt sitting -- San Francisco--with Judge Zirpoli sitting, and in Los Angeles--with myself sitting -- sometime around October 1967. If this procedure is followed, it is anticipated that all cases will be ready for trial at the same time, so that if any are settled out prior to trial, other cases will be substituted for trial in their place." (Appendix page 11.)

On February 21, 1967 Judge Pence entered Pre-Trial Order No. 9, which contains a provision (paragraph 7Q) identical (except as to dates) with that under review herein. The dates, but not the substance, of Pre-Trial Order No. 9 were revised by Pre-Trial Order No. 12 (dated October 11, 1967), which also contains a provision (paragraph 5P) identical with that under review. On February 26, 1968 Judge Pence signed Pre-Trial Order No. 15, which contains a provision (paragraph 26) comparable in substance to paragraph 5S of Pre-Trial Order No. 14, but which alters the dates of execution and certain of the operable language. Such changes were made to clarify any ambiguity existing in the prior orders. (Pre-Trial Orders Nos. 9, 12, 14 and 15 are attached hereto as appendix pages 12 - 50.) Pre-Trial Order No. 15 superseded all previous orders of the trial court insofar as they may be inconsistent. Applicant's challenge, therefore, must now be directed to paragraph 26 of Pre-Trial Order No. 15. For the convenience of this Court of Appeals we are reproducing below, side by side, the relevant portions of Pre-Trial Orders Nos. 14 and 15.

| Paragraph 5S<br>Pre-Trial Order No. 14 | Paragraph 26<br>Pre-Trial Order No. 15 |
|---|---|
| A pre-trial conference is set for February 21, 1968, at | A pretrial conference is set for June 5, 1968, at |

9:30 a.m. in San Francisco, at which time trial judges Martin Pence (D. Hawaii); George Boldt (W.D. Wash.); Alfonso Zirpoli (N.D. Calif.) and/or such other judges as may be designated, will preside. At such time the trial judges will (a) select not less than three cases for separate trial in any district or districts as may be required; (b) select the districts in which such trials will be held; (c) select the judge to preside in each district, and (d) determine whether other cases pending in any such district should be consolidated for trial. At such conference, a final pre-trial order shall be formulated which sets each designated case or cases for trial to commence at such time

9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the or-

as the presiding judge shall determine, but in no event later than March 18, 1968. Among other things, the following matters will be considered:

derly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer or assignment of the designated cases to such judges. Among other things, the following matters will be considered:

Sub-paragraphs 5S(1)-(16) of Pre-Trial Order No. 14 are identical with sub-paragraphs 26(A)-(P) of Pre-Trial Order No. 15. (Appendix pages 33 - 50.)

On October 30, 1967 applicant filed with this Court of Appeals a Motion For Leave To File Petition For Writ of Mandamus, which was denied on December 1, 1967 under the title of American Pipe and Construction Co. v. Honorable Martin Pence, Chief Judge of the United States

District Court for the District of Hawaii, Cause Number 22336. (Appendix page 51.) Applicant's mandamus petition asserted the same basic claim of error as is now before this Court of Appeals. (Appendix pages 52 - 59.) Applicant filed an Application For Reconsideration Of Motion For Leave To File Petition For Writ Of Mandamus and Request For Hearing En Banc on December 22, 1967, which was denied by this Court of Appeals on January 9, 1968. (Appendix page 60.) Prior to a ruling on the application for reconsideration, on December 26, 1967, applicant filed the notices of appeal from which has evolved the instant proceedings. Three days after filing its notices of appeal, on December 29, 1967, applicant wrote Judge Pence a letter (Appendix page 61) asserting that the trial court was deprived of jurisdiction to proceed in these actions by reason of the pending appeal. On January 12, 1968 Judge Pence conducted a pre-trial conference to determine the effect, if any, of applicant's notices of appeal. At that time Judge Pence held that (1) Pre-Trial Order No. 14 was not an appealable order, (2) applicant's appeals were not well founded and amounted to a nullity, and (3) the trial court retained jurisdiction to continue processing the litigation. On January 26, 1968 applicant moved this Court of Appeals for a stay of proceedings below pending appeal. On applicant's

motion a temporary stay was entered on January 29, 1968. This Court of Appeals conducted a hearing on applicant's motion for a stay pending appeal on February 5, 1968, at which time it stayed all trials in these actions below and ordered that this proceeding "shall be considered in the nature of mandamus." (Appendix pages 62 - 63.)

Applicant asserts this Court of Appeals has jurisdiction to review Pre-Trial Order No. 14 (now Pre-Trial Order No. 15) under Title 28 U.S.C. § 1291, referring to appeals from final decisions of district courts, and Title 28 U.S.C. § 1651(a), the all writs act. Contentions allegedly supporting the jurisdiction of this Court are set forth in Parts III and IV of applicant's brief, entitled ARGUMENT (at pages 19 - 22). Part III attempts to establish jurisdiction under 28 U.S.C. § 1291 by showing that Pre-Trial Order No. 14 is a final decision of a district judge since it falls under the "collateral order" doctrine, citing Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Gillespie v. United States Steel Corp., 379 U.S. 148 (1964), and Brown Shoe Co. v. United States, 370 U.S. 294 (1962). As noted above, Judge Pence held on January 12, 1968 that Pre-Trial Order No. 14 is not an appealable order under the authority of those cases. This holding of the

court below is implicitly affirmed by the order of this Court of Appeals, dated February 5, 1968, which "ORDERED that this proceeding shall be considered in the nature of mandamus . . . ." We therefore consider applicant's assertions of jurisdiction based on appeal from a final decision as moot, and do not contest them here.

Neither do we contest the assertions made in Part IV of applicant's brief, referring to review under 28 U.S.C. § 1651(a). This Court of Appeals having held that the instant proceedings constitute a petition for writ of mandamus, amicus curiae herein treats it as such. It is because the trial court was not previously represented in this proceeding and is the real party in interest (as set forth in its motion for leave to file an amicus brief), and because of the unusual circumstance that this Court of Appeals is, in effect, considering the same mandamus petition for the third time, that the amicus curiae is appearing herein.

## ISSUE PRESENTED

There is but one basic question presented by these proceedings, to wit, the authority of the district judge to control his own calendar and set ready actions for trial.

## SPECIFICATION OF ERROR

Applicant has alleged only one ground for error, the entry of Pre-Trial Order No. 14, paragraph 5S. As noted above Pre-Trial Orders Nos. 9 and 12 contained provisions with identical language. Although we are not certain why such identical provisions of pre-trial orders operating in the same factual context would not likewise be error, and presumably reviewable at the time of entry in a similar manner, we will not assert that applicant's 11-month delayed challenge is estopped or waived. Rather, we urge that applicant's assertions be tested on the merits.

It has also been noted that Pre-Trial Order No. 15, paragraph 26, supersedes paragraph 5S of Pre-Trial Order No. 14. Accordingly, we will orient our discussion to the language of the now controlling order of the trial court.

## ARGUMENT

### I.

### Three Separate Trials As Contemplated By Pre-Trial Order No. 15, Paragraph 26 Will Not Deny Applicant A Fair Trial

Paragraph 26 of Pre-Trial Order No. 15 contains the following provision relating to trial settings:

"A pretrial conference is set for June 5, 1968, at 9:30 A.M. in San Francisco, California, before Judge Martin Pence (D. Hawaii), with Judges George Boldt (W.D. Wash.), Alfonso Zirpoli (N.D. Calif.), and/or such other judges as may be designated, present. At such time, after hearing, and after consultation with the other judges, Judge Pence will (a) select not less than three cases for separate trial; (b) select the districts in which such trials will be held; (c) determine the judge to preside in each such district; (d) determine whether other cases pending in any such district should be consolidated for trial; (e) formulate a final pretrial order for each trial case, setting such cases for trial at such times as will permit the orderly processing of three overlapping trials, with the first trial to commence before Judge Pence in either the Southern or Central District of California no later than June 24, 1968, and with each succeeding trial to commence thereafter at intervals of not less than two weeks each; and (f) take such action as is necessary for transfer

"or assignment of the designated cases to such judges. Among other things, the following matters will be considered: "

Applicant stated twenty-two (22) times in its brief that it faces "three simultaneous trials", and catalogued the horrendous inequities to which it would be subjected by such an ordeal. Not once did applicant insert any modifying word to indicate or even hint that the three separate trials would not begin on the same minute of the same hour of the same day. Yet, for over 11 months it has been clearly understood by everyone (and that includes applicant's attorneys) acquainted with the anticipated procedure that specific trial settings would not be made until the three proposed trial judges could sit in conference and evaluate the then pending actions to determine (a) the most appropriate actions for trial, and (b) methods for coordinating the separate proceedings to insure fair trials. Since applicants can hardly deny that they are familiar with the history and language of the district court's order, applicant therefore appears to have deliberately misled this Court of Appeals by suggesting that the trials would "proceed simultaneously and approximately at the same pace . . . ." (Applicant's brief at page 15.) Judge Pence's first

communication to counsel regarding three separate trial settings indicated that the trials would begin at staggered intervals. (Appendix page 11.) Pre-Trial Order No. 15 now specifies that such intervals shall not be less than two weeks. We must presume that experienced trial judges, such as the three named, will, of course, adjust their respective calendars to insure orderly and coherent trials.

Applicant has accurately stated that Judge Pence designed pre-trial proceedings to prepare all actions for trial on a common schedule. Such a plan was followed for the first fifteen (15) months that Judge Pence presided over these actions. At that time it was suggested that four bellweather actions be singled out for further pre-trial proceedings and seriatim trial, with all remaining actions (then over 100) stayed until conclusion of the bellweather trials. After four months of consideration Judge Pence tentatively adopted such a plan, contemplating trials spaced at 60- to 90-day intervals. Judge Pence continued to wrestle with this "angel", which match resulted in his letter of November 28, 1966 suggesting continuation of the simultaneous <u>preparation</u> of all actions but with three separate trial settings. The decisive factors in his decision were:

(1) The pending actions admittedly grow out of the same Government proceeding and the claims rely upon the same underlying assertions. Since these actions involve "similar claims, issues, and in many instances, identical oral testimony and documentary evidence" (Applicant's brief at page 1), the preparation of one action for trial is in most regards the preparation of all actions for trial.

(2) If the four bellweather trials procedure were followed, assuming each lasted 60 days with 60-day intervals between, Judge Pence would have spent fourteen (14) months processing four actions, and the claims of the vast majority of plaintiffs would still remain untried. If one or more of the bellweather actions were settled before trial an extensive hiatus would be necessary to prepare a substitute action for trial.

(3) All plaintiffs are entitled to a speedy determination of their claims. The "bellweather" approach prejudices the majority of plaintiffs by staying their proceedings approximately two (2) years while selected actions are processed. This is true despite the fact that any system for

selecting the bellweather actions is functionally arbitrary. Admitting that there will be preference given particular claims by selection for the initial trials under the current order, this procedure minimizes the different treatment given the parties.

(4) The almost explosive, nation-wide increase in multiple related filings presents both the trial and appellate judiciary with novel problems of judicial administration and requires innovative procedures. As Judge Pence has often told counsel, quoting Dr. Hayakawa, we must all be extentionalists, and adapt ourselves to ever changing circumstances. The assignment by the Chief Judge of the Court of Appeals of this mass of related actions to a single district judge for coordinated proceedings has resulted in economies and savings which have inured to the benefit of the courts and parties alike. However, the benefits of coordinated proceedings are primarily limited to the pre-trial stages, especially where, as here, one of the parties is exercising its right to demand a jury trial. Rule 38, Fed. R.

Civ. Pro.; Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); Beacon Theatres, Inc. v. Westover, United States District Judge, 359 U.S. 500 (1959).

(5) Claims of some 300 plaintiffs in 27 actions based on approximately 2200 transactions are too voluminous to permit a single, equitable, consolidated jury trial. (At the time the challenged provision was first ordered the number of claims was over 3 times larger than now pending.) Twenty-seven separate seriatim trials before a single judge would require an indeterminate amount of time--seven years if we presume four trials a year. Assuming five or six consolidated trials is feasible, a minimum of 18 months would be necessary if all actions were tried before a single judge.

(6) New procedures must be devised to accelerate trial settings in instances of multiple litigation while retaining the benefits of coordination, for which these actions were originally assigned to Judge Pence. The orderly administration of the courts demands that the parties be

relieved of the possibility of different and possibly conflicting pre-trial rulings and proceedings before different judges, with all the waste and inefficiency inherent in duplicative or conflicting proceedings in related actions. At the same time, trials must be scheduled which assure prompt adjudication of all claims. The trial plan ordered by Pre-Trial Orders Nos. 9, 12, 14, and 15 accomplishes this purpose by the simple procedure of assigning ready cases to other experienced judges for trial. This same method of calendar control is utilized by every jurisdiction which employs a master calendar.

(7) The actions would be tried in the jurisdictions where filed. The trial locations and probable presiding judges will be determined sufficiently prior to trial to allow all parties opportunity to secure sufficient personnel.

Considering these factors, Judge Pence initiated the chain of events resulting in the provision of Pre-Trial Order No. 15 here being reviewed. The two proposed additional trial judges have been continually informed of

proceedings in these actions, and have maintained their dockets to allow for trials when specific actions are ready and assigned.

Applicant sets forth certain specific inequities which would be caused by separate trials as ordered by Pre-Trial Order No. 15. These include asserted difficulties connected with (a) coordinating different trial staffs, (b) and (c) meeting the same or similar evidence in different locations at the same time, and (d) and (e) producing the same witnesses and documents in different locations at the same time. However, assuming arguendo that such conditions would be prejudicial, applicant's assertions rest on the fanciful position noted above that all three trials would commence literally simultaneously. This is not the case, was never intended, and has never been ordered by the district court. Each and every one of applicant's specific complaints, therefore, evaporate. In fact, rather than being prejudicial, overlapping trials as contemplated may produce substantial benefits by limiting the number of times counsel must prepare witnesses, minimizing witnesses' memory problems, and maintaining consistency in testimony. Applicant assumes that a barrier exists which precludes the various judges from cooperating and coordinating the conduct of

their trials if such is necessary. However, in this era consultation is as close as the nearest telephone. Considering the staggered starting dates for each trial, and the projected length of trial, it is silly to presume that each of these experienced trial judges can not carry on his particular trial in an orderly fashion.

Applicant concludes that paragraph 26 of Pre-Trial Order No. 15 has no saving grace save as a weapon to force applicant to settle these actions. But district courts cannot expect, assume, or rely on the parties to any action reaching an amicable adjustment of their differences. District courts can only presume that lawsuits are to be resolved by trial. To do otherwise would create a moribund and chaotic docket. The Judicial Conference of the United States has stated that actions pending more than two years are stale and might properly be ripe for dismissal for want of prosecution. Some of these claims have already been pending for more than three years. By June, 1968, the initial date now set for trial herein, all of these actions will have been pending for over two years. The district court has only one course of conduct available: to insist that each and all of these actions are prepared for trial, to set these actions for trial as soon as is reasonably

possible, and, when then ready, to see that trials are undertaken, all as ordered by the pre-trial orders herein.

II

Applicant Has Not Been Prejudiced By Consolidations For Trial As No Such Consolidations Have Been Ordered

Page 17 of applicant's brief is devoted to establishing the proposition that "the trial court /must/ . . . devise a plan of partial or complete consolidation /under Rule 42(a), F.R.C.P./ which will not cause prejudice or else allow cases to be tried separately." The court below has never entered any order consolidating any of these actions for trial. To the contrary, on the one occasion when a consolidation motion was presented (Appendix pages 64 - 66), Judge Pence reserved ruling until a more appropriate time. Pre-Trial Orders Nos. 9, 12, 14 and 15 specifically state that each order applies severally to each pending action. Applicant's assertions regarding consolidation, therefore, are mere platitudes, and have no relevancy to the subject matter of this proceeding.

III

Pre-Trial Order No. 15 Does Not Attempt To Constitute An Improper Court

Applicant has clutched upon the words "will preside" in Pre-Trial Order No. 14, paragraph 5S, line 10, and would now have this Court believe that Judge Pence was thereby attempting to convene a "special" three-judge district court, an "unorthodox panel", a "committee", to sit and "make substantive rulings" effecting the outcome of these actions. (Applicant's brief at pages 18 - 19.) Allowing that the language of Pre-Trial Order No. 14 may have been ambiguous enough to permit such fanciful arguments--even though applicant knew the underlying facts to be otherwise, the now controlling Pre-Trial Order No. 15, paragraph 26, clearly states that Judge Pence will continue to be the sole presiding judge in these actions until they are formally assigned to other judges pursuant to the conventional procedures therefor. Long before Pre-Trial Order No. 15, however, on December 14, 1966, at the very first hearing on the proposed trial settings (Pre-Trial Order No. 9), Judge Pence told all parties that all normal and necessary procedures required to assign these actions to any other judge would be followed. The following colloguy from the

transcript of December 14, 1966 between Judge Pence and Mr. Jansen, counsel for applicant, is particularly pertinent:

"MR. JANSEN: Now, I'd like to conclude, your Honor, by suggesting one thing and that is that before I came to court today, I went to the Clerk's office and obtained a copy of the order assigning the cases here in this district to you for all proceedings. Now, this order was signed by Judge Harris on December 15, 1964, and it says, '. . . good cause appearing, therefore it is hereby ordered that each of the following cases be and they are hereby assigned for all further proceedings to the Honorable Martin Pence, Chief Judge of the United States District Court for the District of Hawaii, . . . .' . . . And I find in this order that you are designated--you are assigned for all further proceedings and may I respectfully suggest, your Honor, that to go beyond that and, if I may use the word, abdicate, it seems to me might fly right --

"THE COURT: Counsel, don't concern yourself with what that order says until after we have

"decided, if we do decide, that we are going to have all of the key cases tried simi-simultaneously (sic) because, as you may recognize, what was true yesterday is not necessarily true today. That is true in your own situation. It is true on the books here and that is why I am sitting here. That is why I will continue to sit until such time as I decide and if my decision is concurred in by Judge Harris and Judge Chambers, by Judge Clark, Judge Lindberg, as it might be, at which time if it is necessary that the order be changed, it will be changed." (Appendix pages 67 - 70.)

Paragraph 26 of Pre-Trial Order No. 15 also specifies that the two additional trial judges will be attending the pre-trial conference now scheduled for June 5, 1968 for "consultation" with Judge Pence, and not as presiding judges. Judge Pence will make such rulings as may be appropriate until such time as these actions are no longer pending on his docket. Nothing prevents Judge Pence from continuing matters now appearing on the agenda for the June 5, 1968 conference which might be better handled by the trial judge.

Pre-Trial Order No. 15 does not contemplate creation of any special three-judge court, or provide for any action not authorized by law (nor was such ever contemplated under Pre-Trial Order No. 14).

## CONCLUSION

Applicant has petitioned this Court of Appeals for a writ of mandamus curtailing the freedom of the district court to (1) set ready cases for trial, and (2) control its own docket. The order of the court below does not infringe upon any right of applicant or constitute a patent abuse of the district court's discretion. Accordingly, this Court of Appeals should not interfere with the trial settings contained in Pre-Trial Order No. 15, paragraph 26.

DATED: February 29, 1968.

Respectfully submitted,

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Honorable Martin Pence.

CERTIFICATE

I certify that, in the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

Joel D. Cooper

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